

# Food & Beverage

## LITIGATION UPDATE

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# Food & Beverage

## LITIGATION UPDATE

### Legislation, Regulations and Standards 110th Congress

#### [1] House Agriculture Committee Hears Testimony About CO in Meat Packaging

Representatives of the nation's major meat-packing companies testified before the House Agriculture Committee during an October 30, 2007, hearing to consider the safety of meat industry technology. They told the committee that infusing beef with carbon monoxide (CO) allows the meat to retain its bright red color and poses no adverse health effects because of the low levels of CO used. A representative of Tyson Foods reportedly testified that the company discontinued the practice "because of a lack of consumer demand, not because of any food safety concern." The company experts, who brought samples to the hearing, noted that the technology meets consumer demand for beef with a distinct red color. Low-oxygen packaging with carbon monoxide apparently stays fresh for more than a month.

An advocacy group that attended the hearing, but did not testify, reportedly brought six sealed packages of ground beef kept at room temperature for two days to demonstrate that the technology keeps

spoiled meat red. According to Food and Water Watch, consumers base their consumption decisions on a product's color, and there is no way to tell whether CO-treated meat is fresh. *See Arkansas News*, October 31, 2007.

#### [2] DeLauro Introduces MEAL Act to Combat Obesity

U.S. Representative Rosa DeLauro (D-Conn.) recently introduced [legislation](#) (H.R. 3895) that would require "fast-food and large chain restaurants to provide nutritional information on their menus for customers." Titled the "Menu Education and Labeling (MEAL) Act," the bill would compel these establishments to list calories, saturated and *trans* fats, and sodium content on printed menus and only calories on menu boards where space is limited. Exempting small local chains and neighborhood restaurants, the proposed regulations would apply only to standard menu items, not to special orders or daily specials. "A major contributor to [the obesity] problem is that busy families are increasingly dining out," DeLauro said in a press release. "Since 1970, spending by American consumers has increased eighteen-fold, and research studies have found that when adults and children restaurant foods, they consumer more calories and more fat. This makes consumer access to nutritional information more important than ever." *See DeLauro Press Release*, October 18, 2007.



## Occupational Safety & Health Administration (OSHA)

### [3] OSHA Issues Guidance and Safety Bulletin on Diacetyl

OSHA has published two documents on diacetyl, the butter-flavoring used in microwave popcorn, snack foods, pet foods, candies, baked goods, and other food products. Neither creates any legal obligations and are intended to be advisory and informational. OSHA's "[Hazard Communication Guidance for Diacetyl and Food Flavorings Containing Diacetyl](#)" provides a summary of available information, noting that a number of exposed employees have developed "serious respiratory illness," and discusses the duties of chemical manufacturers and importers to provide health hazard information on product labels and material safety data sheets. The guidance also provides recommendations about engineering controls, respiratory protection and personal protective equipment.

The second document, "[Respiratory Disease Among Employees in Microwave Popcorn Processing Plants](#)," is a safety and health information bulletin that discusses cases of lung disease found in workers at a microwave popcorn production facility and the subsequent investigation by the National Institute for Occupational Safety and Health (NIOSH). Based on NIOSH's findings, OSHA recommends and provides details about engineering and work practice controls, environmental monitoring, personal protection, and training as methods to reduce exposures. Both documents were published October 24, 2007.

In a related development, European Union (EU) regulators are reportedly evaluating diacetyl in consumer products and will take action if "a possible health risk for consumers cannot be

excluded when inhaling diacetyl." The chemical is apparently approved for use in the EU and some popcorn manufacturers use the chemical for flavoring; some have set their own worker safety standards, while others are apparently awaiting an opinion from the European Food Safety Authority (EFSA). The EFSA is currently studying the chemical as part of a larger flavorings study and is reportedly taking U.S. case study findings seriously. See *FoodUSANavigator.com*, October 31, 2007.

Meanwhile, a recent *Associated Press* article discusses the U.S. workers who claim they became ill from exposure and have sued to recover damages against the companies that produce or use diacetyl. The workers reportedly have difficulty when they try to undertake any physical activity, and some are awaiting lung transplants. According to a NIOSH investigator, the disease progresses quickly in those who contract it. He was quoted as saying, "In months you can go from being a healthy person to hardly being able to breathe, coughing all the time, not being able to do your job. It's terrifying." Attorney Ken McClain, who won millions of dollars for workers sickened at a Missouri popcorn manufacturing plant, reportedly has more than 500 lawsuits pending. The article also highlights efforts in Congress to order federal safety regulators to take action to limit workplace exposures and notes that major popcorn manufacturers are eliminating the chemical from their products. See *Associated Press*, October 27, 2007.

## Environmental Protection Agency (EPA)

### [4] Agency Finds Decrease in StarLink® Contamination; Recommends Ending Tests

EPA has issued a draft [white paper](#), "Concerning Dietary Exposure to Cry9c Protein Produced by Starlink® Corn and the Potential Risks Associated



with Such Exposure,” for public comment. The agency is recommending that tests for the protein’s presence in the nation’s food supply cease because the levels tested since it contaminated foods such as taco shells, corn flakes and tortillas in 2000 have dramatically decreased. Comments must be submitted on or before December 3, 2007.

Environmentalists and public health advocates, pointing to the protein’s allergenicity, are reportedly concerned about StarLink® continuing to contaminate corn and question the results of tests carried out by industry. They contend that while this genetically modified (GM) seed has not been used for seven years, tests show that it is still present. Approvals for other GM corn under development to produce ethanol are apparently caught up in the controversy. Developers are hoping to use it commercially by 2009, pending federal approval. Meanwhile, the Government Accountability Office is reportedly conducting a review of the government’s biotechnology framework, examining the roles of a number of agencies, at the request of two Senate agriculture committee members. *See Inside EPA*, October 26, 2007.

## American National Standards Institute (ANSI)

### [5] Stakeholder Meeting Held to Discuss Draft Standard for Sustainable Agriculture Practices

An initial stakeholder meeting was held October 29-30, 2007, at the University of California, Berkeley, to discuss a draft [standard](#) titled “Sustainable Agriculture Practice Standard for Food, Fiber and Biofuel Crop Producers and Agricultural Product Handlers and Processors.” Recently published by ANSI, the document was apparently developed by Scientific Certification Systems, which is an accred-

ited certifier with the U.S. National Organic Program, the Forest Stewardship Council and the Marine Stewardship Council.

The draft standard, intended to be applicable to all agricultural crops marketed in the United States, covers agricultural practices at the farm and after the crop leaves the farm. The standard addresses environmental, socioeconomic, product quality, and packaging issues. Among other matters, the draft would require (i) producers to establish a path for transition to organic practices, (ii) a ban on the planting of genetically modified varieties of any plant, (iii) the phase out of pesticides and synthetic fertilizers, (iv) targets for energy efficiency, greenhouse gas emission reductions and soil carbon storage, (v) specified employment practices, and (vi) limitations on the amount of packaging material and the types of material that may be used.

ANSI oversees the creation, promulgation and use of voluntary industry standards and guidelines and is the official U.S. representative to the International Organization for Standardization (ISO). While it does not develop standards, ANSI requires standards-development organizations to follow procedures designed to ensure that the development process is open, due process interests of all stakeholders are protected, and the standards are the product of a consensus-based process.

## China

### [6] China Enacts New Food Safety Laws, Arrests 774 People in Nationwide Investigation

The Chinese government has reportedly approved new legislation intended to improve national standards in food production, processing, delivery, storage, and sales. Billed as the first universal law of its kind in China, the regulation



would apparently standardize all practices related to food production and require local governments to supervise safety and ensure consumer rights in their prefectures. "I believe that the promulgation of this law will certainly effectively raise China's food safety situation and guarantee food safety and people's health," the head of China's General Administration of Quality Supervision, Inspection and Quarantine was quoted as saying. Margaret Chan, the head of the World Health Organization, also said she was "very impressed" with the measure, but encouraged China to continue revamping its safety procedures. The legislation has already passed in the standing committee of the State Council and will proceed to the National People's Congress for further debate. *See Product Liability Law 360°*, October 31, 2007.

Meanwhile, the Chinese government recently revealed that it has arrested 774 people accused of violating food and drug safety standards. Officials announced the arrests as part of a nationwide crackdown on tainted food, drug and agricultural products, which included more than 1,000 tons of fake or substandard goods that were destroyed or recalled from the market. In addition, the Ministry of Agriculture has cited food safety concerns in revoking the registration of 11 highly toxic pesticides manufactured in China for use in other countries. The government earlier this year contended that 99 percent of China's food exports were safe, but regulators have since declared that only 82 percent of the domestic food supply meets safety standards and nearly 30 percent of the nation's restaurants failed inspection. *See The New York Times*, October 29, 2007.

## Japan

### [7] Japanese Confectioner Suspends Operations After Food Safety Scandal

Japanese authorities have reportedly exposed three popular candy companies for lying about the contents of their products, tampering with expiration dates and recycling ingredients. Akafuku, which has been in business since 1707, this week suspended operations after reports surfaced that the famous confectioner had frozen and thawed sweets, altered expiration labels and systematically reused up to 90 percent of its unsold products, despite a company pledge that its bean-jam sweets were made fresh every day. Whistle-blowers also cited the Fujiya Co. for using out-of-date milk in its cream puffs and the Ishiya Co., which manufactures cookies known as Shiroyo Koibito, for falsifying expiration dates. The allegations followed the arrest of several executives at a meatpacking company that apparently labeled ground pork, chicken and rabbit as 100 percent beef, thus raising concerns about the integrity of the Japanese food supply. "But the scandals involving the freshness of products by Akafuku . . . have resonated beyond the marketplace in a way that chicken or beef does not," according to *The New York Times*. The accusations have shaken Japan's gift-giving culture, which has a tradition of travelers bringing back sweets to relatives and friends at home. "In that sense, there is a strong feeling that these happy episodes are being denied," one economics professor was quoted as saying. "It's as if all the sunny days were rotten after all." *See The New York Times*, October 26, 2007.



## State and Local Governments

### [8] Pennsylvania Takes Action Against Misleading Dairy Labeling

Pennsylvania's Department of Agriculture has ordered 16 dairy companies to correct labels that imply their products are safer than others because they are "antibiotic-free," "hormone-free" or "pesticide-free." According to Agriculture Secretary Dennis Wolff, such labels and marketing make "it hard for consumers to make informed decisions."

Apparently, all processed milk sold in the state must be free of antibiotics and pesticides, and no scientific test can determine whether milk is free of synthetic hormones because all milk contains hormones. The companies receiving the notification are located in Connecticut, New Jersey, New York, and Pennsylvania. In praising the action, a farm bureau spokesperson was quoted as saying, "Our members fear that confusion could turn consumers off to buying safe milk products. They might instead buy soda because it's cheaper, and soda's certainly not healthy." See *Pennsylvania Department of Agriculture Press Release*, October 24, 2007; *Lancaster New Era*, October 25, 2007.

### [9] New York State Assembly Addresses Food Additives' Effect on Children's Behavior

The New York State Assembly's Standing Committee on Mental Health, Mental Retardation and Developmental Disabilities this week held a [public hearing](#) to discuss the potential effect of food additives on children's behavior. Legislators specifically referenced a September 2007 *Lancet* study concluding that some food additives could cause behavioral disorders, particularly hyperactivity, in children. In addition to initiating dialogue in the

Assembly, the public hearing aimed to: (i) "ascertain the sufficiency of research into the issue," (ii) "understand the food industry's motivation and responsibility with respect to excessive use of food additives; (iii) "discuss possible responses to the increasing use of food additives in America's food," and (iv) "discuss what government's role in response to these questions ought to be."

Committee members also heard remarks from the Center for Science in the Public Interest, which advocates prohibiting certain additives in candies, soft drinks, breakfast cereals, and other foods marketed to children. "On the one hand, it is surprising that artificial dyes and preservatives are so widely used in children's foods, given the long-standing concerns about their impact on behavior," CSPI Executive Director Michael Jacobson said. "But then again, the FDA and other health authorities have shown no interest whatsoever in protecting children – and assisting parents – by mandating, or even encouraging, the use of safer ingredients." See *CSPI Press Release*, October 29, 2007.

## Litigation

### [10] Cattlemen Renew Challenge to USDA Import Rule, Citing BSE in Canadian-Born Cattle

The Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America (R-CALF) and a number of advocacy organizations have filed a [complaint](#) in a South Dakota federal court seeking to prevent the implementation of the U.S. Department of Agriculture's (USDA's) cattle import rule. Scheduled to take effect November 19, 2007, the rule would allow imports of live cattle from Canada born after March 1, 1999, and beef products from cattle older than 30 months. According to R-



CALF's CEO, the "rule creates an unjustified and unnecessary increased risk of infection of the U.S. cattle herd with BSE [bovine spongiform encephalopathy], and of importing beef contaminated with BSE into the U.S., which will expose U.S. consumers to increased risk of a fatal disease." A USDA spokesperson was quoted as saying, "We are very confident in taking this step in allowing additional commodities from Canada while at the same time protecting the beef supply here in the United States."

Citing statistics on recent BSE cases in Canadian cattle, the complaint alleges that the USDA's rule is arbitrary and capricious and in excess of its statutory authority. Plaintiffs also allege that USDA failed to follow rulemaking procedures, violated the National Environmental Policy Act by failing to conduct an adequate evaluation and failed to comply with the Regulatory Flexibility Act by inadequately assessing the rule's impact on small businesses. Plaintiffs seek an order enjoining implementation of the rule and the importation into the United States of all live cattle of Canadian origin older than 30 months and "all edible bovine meat products from cattle of Canadian origin that were 30 months of age or older at slaughter." They also seek expedited briefing, costs and fees. *See R-CALF Press Release*, October 29, 2007; *The Oregonian*, October 30, 2007.

In August 2007, the Ninth Circuit Court of Appeals upheld a USDA rule classifying Canada as a minimal-risk country and allowing the import of certain beef from Canada. As in the present action, R-CALF contended in that litigation that the agency's rulemaking was arbitrary and capricious. Further details about the Ninth Circuit's opinion appear in issue 229 of this Update.

Meanwhile, the Canadian Food Inspection Agency and the USDA's Food Safety and Inspection Service (FSIS) have reportedly identified the likely source of an *E. coli* outbreak that forced the New Jersey-based Topps Meat Co. to go out of business. Apparently, bacteria in the beef trim from a Canadian firm which supplied Topps matched samples from sick patients in the United States. The Canadian company, Ranchers Beef, Ltd., ceased operations August 15, 2007, but some product that could be tested remained in storage. FSIS has delisted Ranchers Beef as of October 20, and none of its product is eligible to enter the United States. *See meeting-place.com*, October 29, 2007.

#### **[11] Beef Company Files Third-Party Complaint in *E. Coli* Case**

Nebraska Beef, Ltd., which is defending an *E. coli* contamination lawsuit filed by plaintiff's lawyer Bill Marler on behalf of a plaintiff in Minnesota, has filed a third-party complaint against the church that prepared the ground beef meatballs allegedly eaten by the decedent. *Hawkinson v. Interstate Meat Servs, Inc.*, No. 07-21876 (Hennepin County, Minnesota, third-party complaint filed October 23, 2007). According to the complaint, "an environmental assessment of the church kitchen and food preparation procedures by the Minnesota Department of Health indicated that there was a high potential of cross-contamination between ground beef and other food during food preparation" at the smorgasbord dinner held by third-party defendant Salem Lutheran Church. Nebraska Beef contends that plaintiff's damages, "if any, are the direct and proximate result of" the church's negligence or other tortious conduct. Marler reportedly called the move "boneheaded" and further wrote on his blog, "shame on you Nebraska Beef." *See The Wall Street Journal Law Blog*, October 30, 2007.



### [12] Obesity Claims Made Against Fast-Food Restaurant in Missouri Federal Court

A *pro se* litigant, who also filed complaints against God and a cigarette manufacturer, has filed a complaint against McDonald's Restaurants claiming that he "gained 130 lbs. eating McDonald's food" and "got high blood pressure and joint problems." *Rollins v. McDonald's Restaurants*, 07-0824 (U.S. Dist. Ct., W.D. Missouri, filed October 29, 2007). He is demanding \$3 million in damages for a "defective product" and, claiming that he cannot afford an attorney, is also seeking the appointment of counsel.

## Other Developments

### [13] Canadian Health Organizations Call for Salt Reductions in Foods

According to news sources, 17 health and professional organizations are calling on the Canadian government to take action to reduce the levels of sodium in food. The average Canadian reportedly consumes more than 3,100 mg. of sodium each day, most of which is contained in processed foods. Dr. Norm Campbell with Blood Pressure Canada, which spearheaded the development of a National Sodium Policy statement, was quoted as saying, "Increased blood pressure is the leading risk factor for death, causing most of the strokes and much of the heart disease our country faces. It is estimated that almost one in three Canadians who have hypertension would have normal blood pressure if there was less sodium in our food." He also claims that hypertension, affecting at least one million Canadians, costs \$430 million annually in direct health-care costs.

The coalition is also apparently calling on industry to reformulate products so that Canadian

adults will consume no more than 1,500 mg. of sodium daily by 2020. Among those organizations signing onto the [policy](#) are the Canadian Cardiovascular Society, the Canadian Medical Association, the Canadian Stroke Network, the Canadian Diabetes Association, and the Canadian Council of Cardiovascular Nurses. *See Dietitians of Canada Press Release*, October 25, 2007; *FoodUSANavigator.com*, October 30, 2007.

### [14] CSPI Counts Calories at Olive Garden and Romano's Macaroni Grill

"The bottom line is that just about every plate of pasta at Olive Garden or Macaroni Grill is piled with more than 1,000 calories," alleges the Center for Science in the Public Interest in a recent press release titled "A 3,000 Calorie Dinner? Belly-ssimo!." The public health watchdog apparently commissioned independent lab tests for Olive Garden dishes and examined company-provided data from Macaroni Grill to compile a list of "picks and pans" for the CSPI *Nutrition Action Healthletter*. CSPI claims that the spaghetti and meatballs entrée at Olive Garden contained 1,260 calories and 19 grams of saturated fat, while Macaroni Grill's version contained 2,430 calories or the equivalent of "six Quarter Pounders." The Sensible Fare® options at Macaroni Grill, however, garnered a "modest" 330 calories for the "Pollo Magro" and 590 calories for the "Simple Salmon." "You'd have to walk briskly for 11 hours or jog an entire marathon to burn off 2,800 calories," opined the CSPI nutrition director of a complete restaurant meal. "But frankly, the only activity most people can devote that kind of time to is sitting in front of a television or computer. No wonder so many Americans are now the shape of a meatball." *See CSPI Press Release*, October 31, 2007.



## Media Coverage

### [15] Kevin Mayhood, "Dangerous Greens and Dirty Birds," *The Columbus Dispatch*, October 23, 2007

According to this article, researchers at Ohio State University, trying to discover how *E. coli* contaminates vegetables such as salad greens and spinach, suspect that starlings may be spreading the bacteria. They have reportedly captured a starling between two dairy farms with the same *E. coli* strain as that found in the cows on those farms. Other researchers are also searching for answers and for ways to protect fruits and vegetables from contamination. They have found that damaged plants release sugars and water at the cut sites, giving bacteria an optimal environment in which to grow. Tests with sprays to shield the damaged areas or kill the *E. coli* there are ongoing.

## Scientific/Technical Items

### [16] Obesity Contributes to Cancer, Claims New Report

The World Cancer Research Fund (WCRF) and the American Institute for Cancer Research (AICR) have issued a joint report claiming that obesity and poor diet are major contributing causes to at least six common cancers. After reviewing 7,000 studies on diet, exercise, weight, and cancer, the meta-analysis reportedly found a connection between excess fat and cancers of the esophagus, pancreas, colon and rectum, endometrium, and kidney, as well as breast cancer in post-menopausal women. In addition, scientists concluded that tall people were more likely to develop cancer and that breast-feeding reduces the risk of cancer for both mother and

child. "Be as lean as possible within the normal range of body weight," advised the report, which recommended that individuals maintain a body mass index between 21 and 23; avoid excessive alcohol, sugar and salt intake; and consume less than 1 pound of red meat per week.

In conjunction with the report, AICR also published a survey of 1,000 U.S. adults revealing that (i) only 38 percent had heard of a link between processed meat and cancer; (ii) only 49 percent knew that a diet lacking fruits and vegetables could contribute to cancer; and (iii) only 46 percent were aware that obesity is a risk-factor for cancer. By comparison, 71 percent believed that pesticides on produce was a cause and 49 percent thought that hormones in beef elevated cancer risk. "Americans are increasingly likely to attribute cancer to factors over which they have no control, and for which no proven links to the disease exists," stated the report. See *CBS News*, *The Los Angeles Times*, *BBC News*, *The Guardian* and *The Telegraph*, October 31, 2007.

Meanwhile, the American Meat Institute Foundation has reportedly criticized the WCRF and AICR recommendations as "extreme, unfounded and out of step with dietary guidelines." The Center for Consumer Freedom (CCF) has also blasted media coverage and government officials for oversimplifying the results. The coalition of restaurants, food companies and consumers noted that several leading scientists, including those who authored the report, preached moderation in diet and "tried-and-true habits for healthy living," such as regular exercise. CCF specifically cited the advice of British oncologist Dr. Karol Simora, who spoke at this week's AICR Launch Conference. "Cancer can't be reduced to a simple formula," he was quoted as saying. "[R]ed meat and bacon in moderation will do us no harm and to suggest they will is wrong."



See *Reuters*, October 31, 2007; *CCF Press Releases*, October 31 and November 1, 2007.

#### **[17] EU Study Compares Conventionally Grown Foods and Organics**

A four-year project, funded by a European Union (EU) grant, has reportedly shown that more nutritionally desirable compounds are found in organically raised fruits, vegetables and cattle than in conventionally raised foods. For example, the Newcastle University research team claims that up to 40 percent more antioxidants were in organic fruits and vegetables than in their non-organic counterparts. The investigation is apparently being carried out near the university in the U.K.'s Tyne valley, and results will be published over the next 12 months. The researchers say their findings call into question the U.K. Food Standards Agency's neutral approach to the benefits of organics. According to a news source, the agency is expected to publish a review of the nutrient content of organic foods sometime in March 2008. See *BBC News*, October 29, 2007.

#### **[18] U.K. Researchers Warn Against Fortifying Flour with Folic Acid**

A paper by researchers at the U.K. Institute of Food Research (IFR) reportedly warns against fortifying flour with synthetic folic acid, arguing that excess folates in the bloodstream could lead to a range of health issues, including leukemia, arthritis, bowel cancer, and ectopic pregnancy. J. Wright, et al., "Folic acid metabolism in human subjects revisited: potential implications for proposed mandatory folic acid fortification in the UK," *British Journal of Nutrition*, October 2007.

The authors contend that unlike natural folic acid that is processed in the small intestine, the synthetic version is metabolized in the liver, which "becomes

saturated" and releases folates into the bloodstream. Earlier this year, the Food Standards Agency recommended mandatory folic acid fortification for flour because the B vitamin has been linked to the prevention of neural tube defects, such as spina bifida. The United States, Canada and Chile already require flour to contain folic acid and regulators in Australia, New Zealand and Ireland are also considering similar measures. The IFR findings could influence future EU legislation concerning the use of folic acid in flour. See *FoodProductionDaily-Europe.com*, October 31, 2007.



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## LITIGATION UPDATE

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Leo Dreyer and Mary Boyd in the Kansas City office of SHB.  
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